REVIEW OF FREEDOM OF INFORMATION ACTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Telephone Company	)	Transmittal No. 2489
Tariff F.C.C. No. 73	)	CC Docket No. 95-158
	)	
Request for Confidential	)	
Treatment	)	

APPLICATION FOR REVIEW OF
SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), pursuant to 47 C.F.R Section 0.459(g), SWBT hereby files its Application for Review of the Order Initiating Investigation released by the Common Carrier Bureau (Bureau) on October 13, 1995.[1] SWBT respectfully requests that the Commission reverse the Investigation Order insofar as it denies SWBT's request for confidential treatment of its cost support data.

I. BACKGROUND

On June 16, 1995, SWBT filed Transmittal No. 2470 proposing to provide 155 Mbps of protected bandwidth to a particular customer at individual case basis (ICB) rates. On August 14, 1995, SWBT supplemented the cost support information submitted with Transmittal No. 2470, upon the informal recommendation of the Commission staff for a

[1] In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2470, 2489, CC Docket No. 95-158 (Com. Car. Bur., released October 13, 1995) (DA 95-2156) (Investigation Order).

disaggregated listing of SWBT's cost support information. SWBT requested that this additional cost support information be treated as confidential.

The Investigation Order found that SWBT's request for confidential treatment did not meet the threshold requirements. The Investigation Order, stated that the Freedom of Information Act permits withholding of "commercial or financial information obtained from a person and privileged or confidential,"[2] and that "[p]arties requesting confidentiality are not required to demonstrate actual competitive harm, rather all they need to show is actual competition and a likelihood of substantial competitive injury."[3]

However, in finding that SWBT had not met the threshold requirements, the Investigation Order determined that SWBT had "failed to explain the competitive significance of the particular data" and had "failed to link these data to specific examples of likely competitive harm."[4]

II. THE *INVESTIGATION ORDER* MISSTATES THE STANDARD FOR CONFIDENTIAL TREATMENT.

The standard upon which the Investigation Order denies SWBT's request for confidential treatment in paragraph 7 is not the standard that the Bureau previously describes in paragraph 6 of the Investigation Order. SWBT satisfies the standard set out by the cited cases in paragraph 6.

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[2] Investigation Order at para. 6.

[3] Id. (The Investigation Order also states that a "sophisticated analysis . . . is not required.")

[4] Investigation Order at para. 7.

The Investigation Order does not deny that substantial actual competition for the service in question exists (further evidence of competition is shown later in this application). In its request for confidential treatment, SWBT explained how a competitor would be able to use the information to enhance its competitive position, and thereby injure SWBT's chances of making additional sales. SWBT stated as follows:

> A firm will be harmed if detailed cost information about its production processes is made public. Such detailed cost information is not generally made available to competitors, customers, industry analysts, academicians, and the general public, by U. S. industries. Indeed, it is considered an anticompetitive practice for such firms to trade price information in many instances, particularly in situations requiring sealed bids from several competitors vying for a specific customer contract. Obviously, if a LEC's costs become public information, all firms seeking to compete with the LEC would have a clear target for pricing their own services. LEC competitors will be able to set prices to enhance their ability to capture LEC customers. Competitors will be fairly confident as to what prices the LEC will submit in various situations. Competitors will then propose a slightly lower price, if it is in their best interest.
>
> Similarly, with LEC cost information widely available, customers requesting bids will strive to obtain prices as close to incremental costs as possible. LECs might eventually be forced to choose between losing their largest, and currently most lucrative, customer accounts to competitors and providing services to such customers at prices from which all contribution toward recovery of LEC common and overhead costs has been eliminated. Of course if a firm's largest customers contribute nothing toward overhead cost recovery, prices charged to smaller customers must rise to permit the firm to recoup its total cost if it is to remain financially viable.
>
> LEC cost data can quickly reveal to a competitor which firm is the lowest cost supplier serving a particular market. If the LEC is the most efficient provider, potential competitors know immediately that they will be more likely to maximize profits if they are geared toward satisfying some specific niche demand.

> This clearly benefits LEC competitors as they design marketing strategies aimed at capturing as much of the LEC's business as possible.[5]

This material coupled with the uncontested affidavit filed with SWBT's transmittal, and the unquestioned existence of competition, satisfies the applicable standards. Under the standards described in paragraph 6 of the Investigation Order, "actual competition and a likelihood of substantial competitive injury," SWBT's cost support materials must be afforded confidential treatment.

The Investigation Order characterizes SWBT's filing as "a generalized concern" over disclosure. The Investigation Order also states that SWBT "offers no support" for its claim of likely competitive injury. However, as stated above by SWBT, any competitors of SWBT will be able to use the information as described. The Investigation Order does not cite to the explanation offered by SWBT, nor does it explain why injury to SWBT's competitive position would not occur in the manner described. Thus, not only does the Investigation Order reach the wrong conclusion, on a separate ground, it should be reversed since it does not properly explain the basis for its decision in light of the justification offered by SWBT.[6]

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[5] Letter from Thomas A. Pajda, SWBT, to Mr. William F. Caton, FCC, re: Southwestern Bell Confidential Documents; Transmittal No. 2489, dated August 14, 1995, at p. 3. (SWBT FOIA Request).

[6] On judicial review, the court is "to assure that the agency has given reasoned consideration to all the material facts and issues." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C.Cir. 1970); The Commission's decision "must be based on a reviewable, reasonable explanation." Telephone and Data Systems, Inc. v. FCC 19 F.3d 655, 657 (D.C. Cir. 1994).

The cases cited by the Investigation Order directly support SWBT's position. The first case cited, National Parks and Conservation Association v. Morton,[7] cites to the Senate Report from the Freedom of Information Act legislation, quoting the section that states that the exception is to protect information "which would customarily not be released to the public by the person from whom it was obtained."[8] The declaration of David Ho attached to SWBT's filing explicitly stated that the information "has been maintained on a confidential basis within SWBT and would not ordinarily be disclosed to parties outside SWBT." Thus, SWBT has explicitly satisfied this criteria from the National Parks case.

The Critical Mass Energy Project v. NRC[9] case limited the application of the National Parks test to information which is required to be provided to the Government. It is an open question in this case whether SWBT is required to provide the information in question in support of the tariff filing. As noted previously, SWBT made the additional cost support filing at the recommendation of Commission staff; however, SWBT has been asked in the Investigation Order to submit a Direct Case on the question of whether its original level of cost support is sufficient to justify the ICB service. To the extent SWBT's filing is voluntary, more lenient standards for confidential treatment apply.

In the National Parks and Conservation Assoc. v. Kleppe[10] case, competitors of concessioners of certain national parks desired the detailed operating information,

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[7] National Parks and Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[8] 498 F.2d at 766.

[9] Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

[10] National Parks and Conservation Assoc. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

including cost information, that the concessioners had to file with the Government. The Court determined that:

> Viewing the District Court's findings that these five concessioners face competition in light of the extremely detailed and comprehensive nature of the financial records requested by the Association, we consider the likelihood of substantial harm to their competitive positions to be virtually axiomatic. Disclosure would provide competitors with valuable insights into the operational strengths and weaknesses of a concessioner, while the non-concessioners could continue in the customary manner of 'playing their cards close to their chest.' Selective pricing, market concentration, expansion plans and possible takeover bids would be facilitated by knowledge of the financial information the Association seeks. Suppliers, contractors, labor unions and creditors, too, could use such information to bargain for higher prices, wages or interest rates, while the concessioners' unregulated competitors would not be similarly exposed.[11]

Likewise, if SWBT is required to disclose the information in question it would give competitors similar advantages. The Bureau has recognized that local exchange carrier cost support information is of value to competitors.[12] In the McGrew Letter, the Bureau determined that

> such information could be used by competitors to devise strategies to introduce new weaknesses to the competitors' benefit, or exploit weaknesses in the existing CBT operation. Using information obtained from CBT data as a model, a competitor would be provided a 'heads-up' for use in negotiating their own rates or agreements.[13]

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[11] 547 F.2d 673, 684.

[12] Letter from Kathleen M.H. Wallman, Com. Car. Bur., FCC, to John L. McGrew, Willkie, Farr & Gallagher (DA 95-1788), dated August 11, 1995 at p. 3. (McGrew Letter)

[13] McGrew Letter at p. 3.

Similarly, SWBT would suffer competitive harm if its cost support information were made public. Thus, SWBT's cost support information is entitled to confidential treatment.

III. SWBT FACES CLEAR COMPETITION FOR THE SERVICE IN QUESTION.

It is uncontested by the Investigation Order that "actual competition" for SWBT's services exists in this case. All of these competitors would benefit, to SWBT's detriment, from disclosure.

Kansas City FiberNet

As shown by the attached advertising materials, (Attachment A) Kansas City FiberNet competes with SWBT for SONET (Synchronous Optical Network) services in the Kansas City area. The materials show that FiberNet maintains a "Kansas network." 155 Mpbs service (also known as OC3 service), as described in SWBT's Transmittal No. 2470, is one of the SONET services with which Kansas City FiberNet competes.

Cox Fibernet

Cox Fibernet, with tariffs filed at the Commission under the name of Cox Communications Inc., offers OC3 service in SWBT's territory. The attached pages (Attachment B) show that Cox Fibernet offers OC3 service at ICB rates. Further, Cox Fibernet's tariff explicitly states that it "does not apply to private carriage, carrier-to-carrier contracts or other noncommon carrier services."[14] Thus, even if OC3 service was not listed in Cox Fibernet's tariff, it still might be offered by Cox Fibernet. The tariff pages, however, clearly establish Cox Fibernet as an active competitor.

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[14] Title page of Cox Communications Inc., FCC Tariff No. 2.

Teleport Communications Group Inc.

Teleport Communications Group Inc.'s (TCG's) Tariff F.C.C. No. 2 also shows that TCG is an active competitor of SWBT for OC3 service. The attached pages (Attachment C) from TCG's tariff show that it provides OC3 service at ICB rates.

Metropolitan Fiber Systems

Attached (Attachment D) is a page of Metropolitan Fiber System's (MFS') advertising materials which states that its "SONET services deliver transmission payloads ranging from STS-1 to OC-48." Thus, MFS also provides OC3 service in SWBT's territory.

This sampling of competitors in SWBT territory clearly proves that SWBT is subject to active competition for its OC3 service. These and other competitors of SWBT, such as MCI, would benefit from disclosure. Even if a competitor of SWBT does not presently offer OC3 service, this information could influence whether they choose to become active in the market.

IV. SWBT WILL BE COMPETITIVELY HARMED BY DISCLOSURE.

In concluding that SWBT has not satisfied the requirements for claiming confidentiality of cost data,[15] the Bureau proposes to make public information which other industry participants are staunchly unwilling to publish. Contrary to the Investigation Order's view, other telecommunications service providers apparently consider data specifying investment, expenses, overheads, and direct costs for equipment competitively valuable. Not only is the information valuable for competition for the precise case in question, given this

[15] Investigation Order at para. 7.

information for each rate element comprising a particular SWBT service offering could provide sufficient data for competitors to accurately estimate likely SWBT prices for all similar situations.

With this information, interexchange carriers (IXCs) seeking high capacity transmission facilities and services could quickly identify the necessary components, refer to SWBT's direct costs, investments, expenses, and overheads for each rate element required for the proposed network arrangement,[16] and approach alternative suppliers (such as MFS, TCG, or any other firm operating in this market) with a clear price target. If any other supplier is willing and able to meet the IXC's requirements, SWBT could be precluded from the presumably competitive process that dominates Request for Proposals and Request for Bids situations. The IXC customer could be deprived of the benefits of the competitive process by ignoring the possibility that SWBT might choose to forego some contribution toward joint and common costs in bidding on a particular proposal. As a result, industry resources are not used efficiently, customers do not receive the lowest possible prices, and SWBT is prevented from securing new business because detailed information for SWBT is known by all other market participants.

Alternatively, even if an IXC accepted bids from various suppliers for a well-defined project, firms competing against SWBT could have a relatively accurate estimate of SWBT's proposed price prior to submitting their own bids. Other firms would then know that a price slightly below what SWBT is likely to propose could secure the business from

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[16] This is the information the Bureau is proposing to publish. See, SWBT FOIA Request, at p. 1.

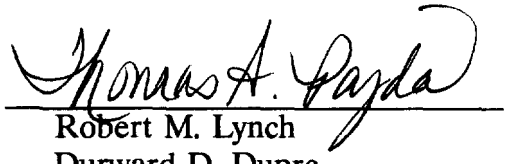
the IXC. SWBT's competitive position in the bidding process is therefore significantly weakened by having its investments, expenses, overheads, and direct costs for equipment for each rate element involved in the proposal known by all other bidders. If encouraging competitive telecommunications markets is a priority among Commission policies, requiring one competitor (i.e., SWBT) to publish rate element-specific costs, while permitting every other supplier to keep this same information to itself, effectively undermines a key element of the current competitive process -- suppliers bidding against each other for lucrative customer accounts.

V. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Investigation Order be reversed insofar as it denies SWBT's request for confidential treatment.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By 

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October 20, 1995

Technology

Innovation delivered to your doorstep

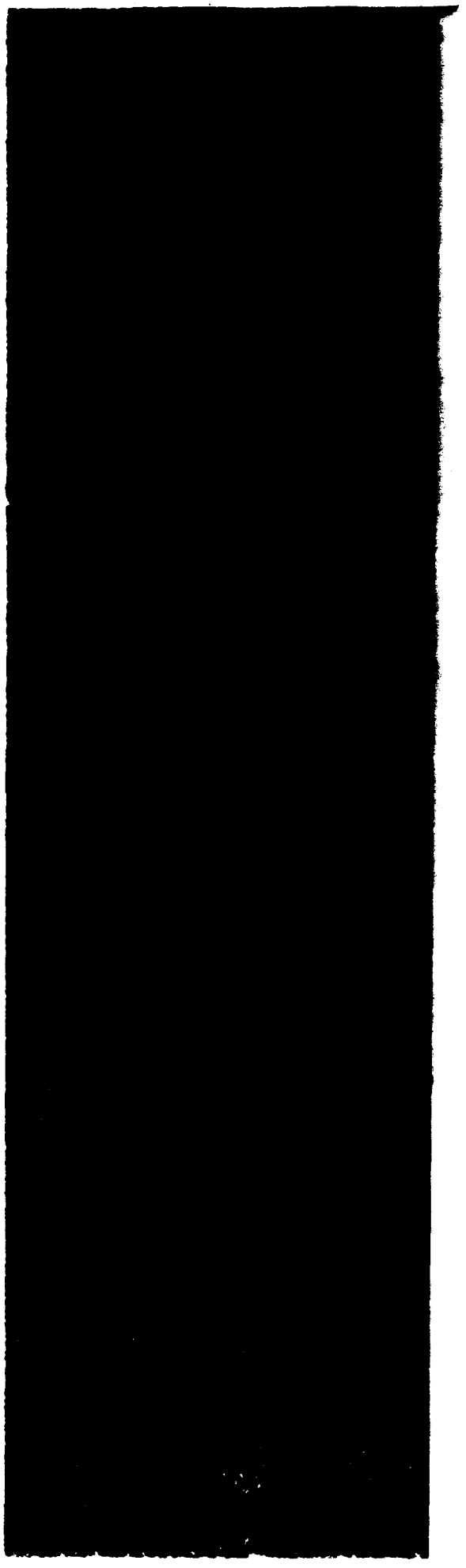
Today's telecommunications needs simply cannot be met with yesterday's technology. Kansas City FiberNet invests in the best technology available and brings it directly to your business.

Our network – more than 200 miles of fiber-optic cable spanning the five-county Greater Kansas City area – is the foundation of our commitment to uncompromising technological excellence. There is no substitute for fiber-optic transmission. It provides unparalleled clarity of transmission, error-free performance, and tremendous capacity. This is the technology that revolutionized the long-distance market. Now it is doing the same for local telecommunications.

But fiber-optic transmission isn't enough. FiberNet is Kansas City's first network provider committed to an all-SONET network. SONET, which stands for Synchronous Optical Network, is a new international standard developed specially for fiber-optic networks. A network built to the SONET standard delivers more capacity for less money, and it does so with greater reliability than outmoded asynchronous transmission systems.

But FiberNet doesn't stop there. All network elements – from alarm systems to fire suppression systems to power systems – are of the highest quality. Primary components are backed up by redundant elements. Automated systems manage the entire network.

Although we have today's latest technology, we're always working to stay ahead of the competition. Our SONET-standard electronics and 100 percent fiber-optic network prepare FiberNet for new generations of technology – making possible [illegible]



Security

Your business depends on it

In the high-stakes world of business telecommunications, sophisticated customers can't afford to depend on unreliable networks.

With Kansas City FiberNet, you won't have to worry about your local telecommunications letting you down. That's why all the long-distance carriers in Kansas City, as well as major corporations and government agencies, rely on FiberNet.

Traditional copper-wire networks are hub-and-spoke systems that leave your business one cable cut away from disaster. FiberNet employs a ring configuration as its network architecture and can simultaneously transmit signals around both sides of a ring to the destination.

In the unlikely event of a service outage on the primary route, the signal automatically switches to the secondary route in a matter of milliseconds. Our fiber rings, coupled with optional dual entrance facilities to your building, provide the ultimate security against transmission failures.

FiberNet's network is built to SONET (Synchronous Optical Network) transmission specifications, a state-of-the-art international standard for transmitting voice, data, graphics and video over fiber-optic lines. SONET was developed when "nearly perfect" network reliability became "not good enough." With our SONET based equipment and ring architecture, total downtime on the FiberNet network is measured in seconds, not hours per year.

Reliability

The quality separating success from failure

Reliability is more than great technology and innovative network design. It is great network performance, excellent customer service, accurate and timely billing, quick response to service requests, and on-time installation. It requires constant attention to detail and a dedication to consistency and responsiveness. Kansas City FiberNet's reliability is why all the interexchange carriers (long-distance companies) trust FiberNet.

Interexchange carriers (IXCs) use FiberNet's high-speed DS3 links as part of their backbone networks. The DS3 links are routed over our SONET-based fiber network, giving FiberNet direct connectivity to all the major IXCs serving Kansas City.

IXCs demand error-free transmission of data signals. FiberNet delivers higher-than-ever quality with bit-error rates approaching zero. IXCs demand reliability. FiberNet delivers with an availability record that measures downtime in seconds per year rather than hours. And IXCs demand responsiveness. FiberNet shaves hours off of industry average repair intervals.

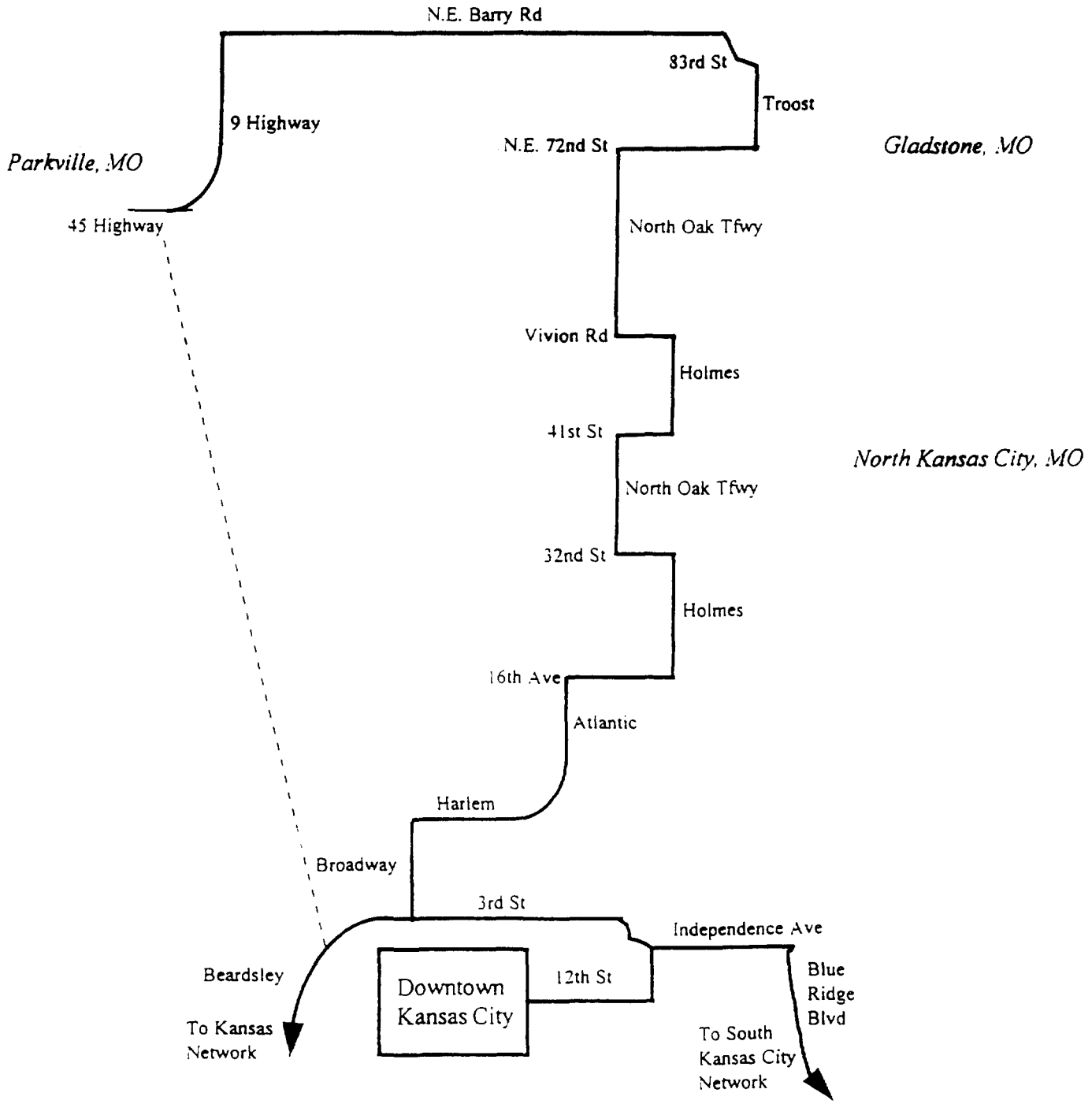
Many IXCs take advantage of FiberNet's automated systems for billing, ordering and service requests. FiberNet helps them eliminate many of the hassles often associated with managing their local access networks.

FiberNet is continually searching for new ways to meet the local access needs of IXCs. Through its collocation points with Bell, FiberNet can provide carriers with entrance facilities to the local phone network for both special- and switched-access traffic. The same demanding levels of reliability required by the IXCs make FiberNet the right solution for all sophisticated users of

KANSAS CITY FIBERNET

The Smart Choice in Telecommunications

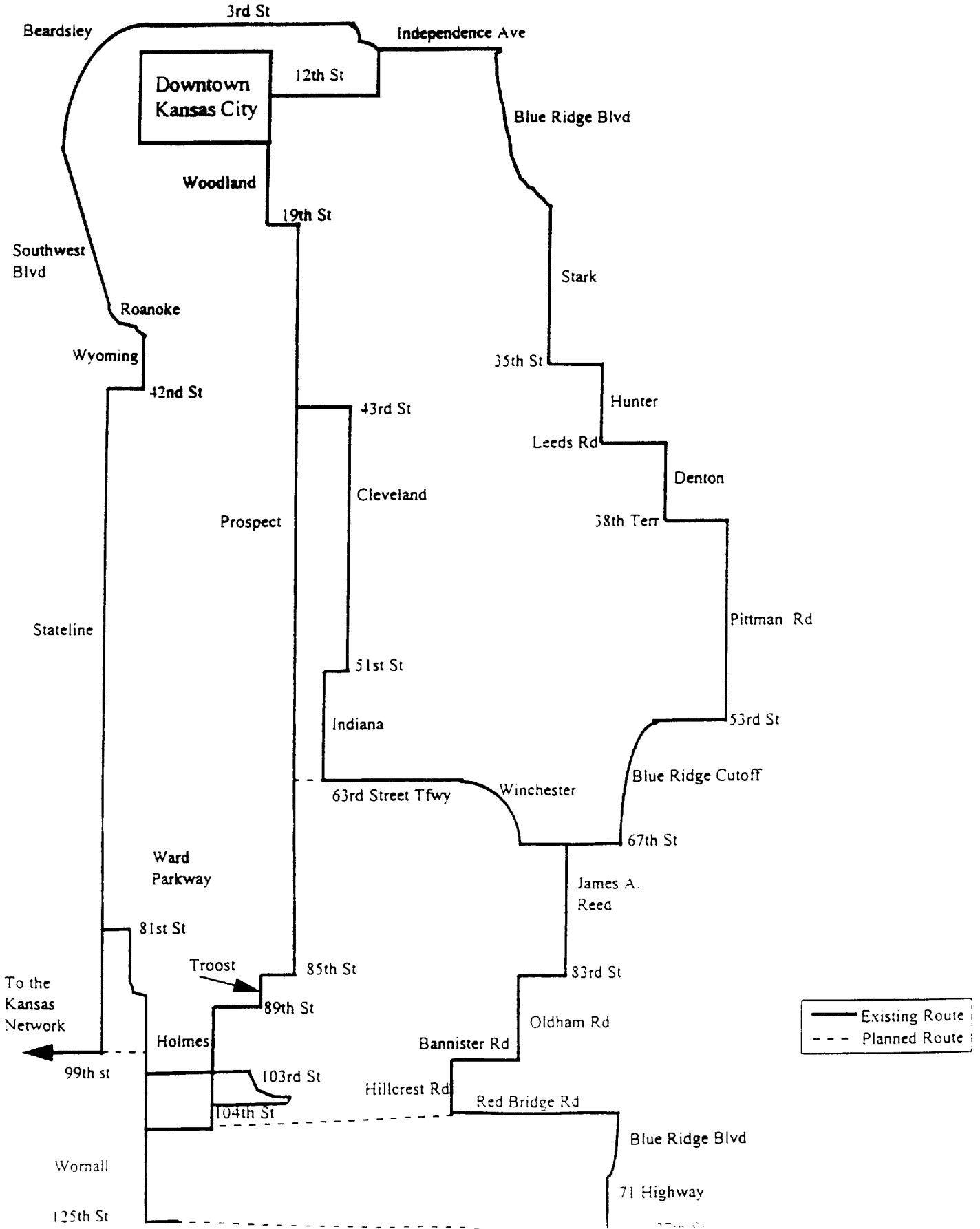
North Kansas City Network



KANSAS CITY FIBERNET

The Smart Choice in Telecommunications

South Kansas City Network



Until now, your business could only do business with Southwestern Bell.

Finally, you have a choice. You can settle for the outdated local access service provided by Southwestern Bell, or you can switch to Kansas City FiberNet and enjoy the most advanced local access technology available today.

Kansas City FiberNet is a highly sophisticated telecommunications company utilizing fiber-optic networks instead of obsolete copper cables. We offer crystal-clear transmissions with virtually no service interruptions.

So call Kansas City FiberNet today to talk about your choices. *Choices.* Isn't it nice to hear that word after all these years?

KANSAS CITY FIBERNET

COX COMMUNICATIONS, INC.
dba COX FIBERNET

FCC TARIFF NO. 2
ORIGINAL TITLE PAGE

TITLE PAGE

This tariff sets forth interstate rates and rules applicable to the provision of interstate common carrier telecommunications services by the Cox Communications, Inc. dba Cox Fibernet which are provided to the general public pursuant to a generally applicable tariff. This tariff does not apply to private carriage, carrier to carrier contracts, or other non-common carrier services.

Cox Fibernet, Mark Dickherber, Alternate Access Business Mgr.,
Cox Cable, 1400 Lake Hearn Drive, Atlanta, Georgia 30319

Cox Fibernet, Mark Dickherber, Alternate Access Business Mgr.,
Cox Cable, 1400 Lake Hearn Drive, Atlanta, Georgia 30319

TELEPORT COMMUNICATIONS GROUP OPERATING COMPANIES **TARIFF FCC NO. 2**
ORIGINAL PAGE 72

5.4.F. Omnilink Rate Schedule

OC-3 OMNILINK RATES

Rates	Recurring		Non-Recurring
	3 YR.	5 YR.	
Cox Hub Node	ICB	ICB	ICB
Cox Port DS-3	ICB	ICB	ICB
Cox Port DS-1	ICB	ICB	ICB
Other Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Transport Mileage Charge:			
Variable Mileage	ICB	ICB	ICB

OC-12 OMNILINK RATES

Rates	Recurring		Non-Recurring
	3 YR.	5 YR.	
Cox Hub Node	ICB	ICB	ICB
Cox Port DS-3	ICB	ICB	ICB
Cox Port DS-1	ICB	ICB	ICB
Other Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Transport Mileage Charge:			
Variable Mileage	ICB	ICB	ICB

5.7.F. Omnilink Rate Schedule

OC-3 OMNILINK RATES

Rates	Recurring		Non-Recurring
	3 YR.	5 YR.	
TCG Hub Node	ICB	ICB	ICB
TCG Port DS-3	ICB	ICB	ICB
TCG Port DS-1	ICB	ICB	ICB
Other Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Transport Mileage Charges: Variable Mileage	ICB	ICB	ICB

OC-12 OMNILINK RATES

Rates	Recurring		Non-Recurring
	3 YR.	5 YR.	
TCG Hub Node	ICB	ICB	ICB
TCG Port DS-3	ICB	ICB	ICB
TCG Port DS-1	ICB	ICB	ICB
Other Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Transport Mileage Charges: Variable Mileage	ICB	ICB	ICB

Andrew J. Burke, Teleport Communications Group
2 Teleport Drive-Suite 300, Staten Island, New York 10311

5.11.F. Omnilink Rate Schedule

OC-3 OMNILINK RATES

TCG Hub Node	ICB	ICB	ICB
TCG Port DS-3	ICB	ICB	ICB
TCG Port DS-1	ICB	ICB	ICB
Other* Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Variable Mileage	ICB	ICB	ICB

OC-12 OMNILINK RATES

TCG Hub Node	ICB	ICB	ICB
TCG Port DS-3	ICB	ICB	ICB
TCG Port DS-1	ICB	ICB	ICB
Other* Node	ICB	ICB	ICB
Other Port DS-3	ICB	ICB	ICB
Other Port DS-1	ICB	ICB	ICB
Variable Mileage	ICB	ICB	ICB

Andrew J. Burke, Teleport Communications Group
2 Teleport Drive-Suite 300, Staten Island, New York 10311

[redacted]

For companies with international requirements for voice, data, and video, MetroFiber E-1 provides a digital transmission facility of 2.048 Mbs. MetroFiber E-1 is commonly used for international private line applications, and provides the digital fiber optic medium to support all dynamically changing networking needs.

[redacted]

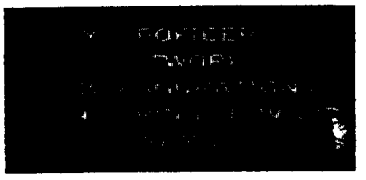
For companies and long distance carriers requiring up to 28 DS-1's between two locations on the MFS Telecom network, MetroFiber DS-3 (45 Mbs) service provides economy and flexibilty with a capacity for 672 voice, analog data, or digital data channels. A single 45 Mbs transmission path supports broadband requirements.

[redacted]

MetroFiber DS-3 Hub service supports commercial, government and carrier customers by carrying individual or multiple DS-1 channels to multiple locations on the MFS Telecom network. MetroFiber DS-3 Hub is designed for the collection or distribution of up to 28 DS-1's to multiple locations on the network. Key service features include flexibility, economy, and quick installation intervals.

[redacted]

For companies with multiple sites requiring truly fault tolerant private networks. MetroFiber SONET services deliver transmission payloads ranging from STS-1 to OC-48.



For companies with multiple long distance carriers, MetroFiber Network Reconfiguration & Monitoring Service (NRMS) provides access into the MFS Telecom Digital Cross Connect System (DCS) enabling customers to re-route their own network from primary to secondary sites.

MFS TELECOM Inc.
METROPOLITAN FIBER SYSTEMS OF HOUSTON, INC.

William P. Woodward, Jr.
Account Executive

600 Travis Street
Suite 1950
Houston, Texas 77002

Tel. (713) 236-9637
Fax (713) 225-3616

CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing Application for Review of Southwestern Bell Telephone Company in Docket 95-158, Transmittal No. 2489, has been served this 20th day of October, 1995 to the Parties of Record.

Liz Jensen

Liz Jensen

October 20, 1995

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